

DAVID A. PROVINSE

IBLA 83-871

Decided October 20, 1983

Appeal from the decision of the Montana State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offer M 50196 in part.

Affirmed.

1. Oil and Gas Leases: Discretion to Lease -- Oil and Gas Leases: Lands Subject to

The Secretary of the Interior may, in his discretion, reject an offer to lease public lands for oil and gas deposits upon a proper determination that the leasing would not be in the public interest.

APPEARANCES: David A. Provinse, pro se.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

David A. Provinse has appealed the decision of the Montana State Office, Bureau of Land Management (BLM), dated July 7, 1983, rejecting noncompetitive oil and gas lease offer M 50196 as to lands that lie within 1 mile of the Swift Dam in T. 28 N., R. 10 W., Principal meridian. Appellant sought to lease the bed of Birch Creek below Swift Dam that is riparian to lot 1, sec. 22, lots 6 to 11, sec. 23, and lot 9, sec. 24 T. 28 N., R. 10 W., Principal meridian. Of those lands lot 6, sec. 23 and lot 9, sec. 24 lie beyond the 1-mile designation and are not at issue in this appeal. 1/

Following receipt of appellant's offer BLM requested leasing recommendations from its District Office and the Federal Energy Regulatory Commission (FERC). The letter to FERC stated that the lands at issue "are within riverbed adjoining lands in Power Site Reserve No. 276." Our review of the appropriate status plat reveals, however, as appellant points out in his statement of reasons, that the lands, although near the reserve, do not adjoin it except for the portion in sec. 22.

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1/ BLM has agreed to lease these lands subject to a no-surface occupancy stipulation.

By letter dated December 17, 1982, FERC responded that the lands lie on the south side of Birch Creek immediately downstream from the 190-foot high Swift Dam of the Pondera County Canal & Reservoir Company and that a preliminary permit for a proposed powerhouse at the dam is outstanding. FERC recommended that no lease be issued for any lands within 1 mile of the dam regardless of their withdrawal status in order to protect the dam and proposed powerhouse from possible damage due to subsidence. FERC concurred in leasing lands beyond the 1-mile limit subject to the no-surface occupancy and powersite stipulations.

BLM's district office recommended leasing of all the lands subject to a no-surface occupancy stipulation because all the lands were within the bed or upper bank of Birch Creek and because the area was subject to heavy fishing and recreational use.

In January 1983, BLM asked FERC for comments on the district office recommendation. On April 7, 1983, FERC responded:

Our \* \* \* objection to oil and gas leasing within one mile of Swift Dam is based on the adverse impact hydrocarbon extraction could have on the safety and operation of the dam and proposed hydropower facility. The extraction of hydrocarbons can and does cause land subsidence, but the actual occurrence and extent cannot be predicted.

The major long term problem that could develop because of hydrocarbon extraction would be land subsidence in the vicinity of the dam. Major subsidence could cause cracking and/or failure of the dam, while minor subsidence could cause misalignment between the turbine and generator.

I hope this clarifies our view that no oil and gas lease should be issued for any lands within one mile of Swift Dam, regardless of their withdrawal status. We cannot concur with the recommendation of your Butte District Office.

Thereafter BLM issued the decision now at issue.

The file also contains a memorandum to the file, dated August 11, 1983, by a BLM surface protection specialist concerning potential subsidence damage to Swift Dam. 2/ He reported:

I checked with several Geologists about the reality of damage from subsidence caused by extraction of oil and gas. Although remote and unpredictable, it is possible.

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2/ A copy of this memorandum was sent to appellant. There is a note indicating that the specialist concurred in FERC's recommendation attached to FERC's April letter. It is not clear whether BLM had the benefit of the specialist's information when it issued its decision, but this Board may nevertheless consider it in deciding this case finally for the Department of the Interior.

In this case, we cannot control the possibility of oil and gas drainage as the dam is bordered by private minerals and the Blackfeet Indian Reservation. We have also issued oil and gas leases without stipulations on adjoining federal minerals. We should not, however, encourage the situation.

I recommend no lease on the lands within one mile for M 50196 and that this also be the case on M 31511 and M 35119 when/if they are leased again. Should the private minerals be leased and produced, we can then issue protective leases as necessary. FERC should be directed to request a withdrawal from oil and gas leasing on these lands.

In his statement of reasons, appellant points out that the lands at issue are riparian to Federal lands included in oil and gas lease M 31511 and are not within or contiguous to a powersite reserve. Appellant asserts that in connection with other leases in the area the Federal Power Commission (FPC) advised issuance of leases with protective stipulations although not a no-surface occupancy stipulation. He directs our attention particularly to a 1973 letter from FPC to BLM concerning lease M 31511 in which FPC stated that, with respect to most lands at issue in this case, FPC had determined in 1955 that the lands would not be injured or destroyed for the purpose of power development by location, entry, or selection under the public land laws, subject to section 24 of the Federal Power Act, 16 U.S.C. § 818 (1976). Appellant contends that the entire lease should issue subject to protective stipulations and that a no-surface occupancy stipulation would adequately protect the interests of FERC. He argues that the refusal to lease based on FERC's request amounts to an improper withdrawal of the lands.

[1] Under the provisions of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. §§ 181-263 (1976), public lands are available for oil and gas leasing at the discretion of the Secretary of the Interior. The Secretary, through his duly authorized representative, BLM, may refuse to lease lands even if the lands have not been withdrawn from the operation of the general mining and mineral leasing laws. Udall v. Tallman, 380 U.S. 1, 4, rehearing denied, 380 U.S. 989 (1965); Joe Lyon, Jr., 63 IBLA 53 (1982). This Board will uphold the refusal to issue a lease provided BLM has set forth its reasons for doing so and provided the background data and facts of record support the conclusion that the refusal is required in the public interest. Joe Lyon, Jr., supra; Placid Oil Co., 44 IBLA 209 (1979), Robert B. Kunkel, 41 IBLA 77, 78 (1979).

Simply because lands are available for leasing does not mandate leasing, and a refusal to lease that is justified in the record does not constitute a withdrawal. Although BLM sought FERC's views on the belief that the land adjoined the powersite reserve, it would not have been improper to inquire in any case given the proximity of the dam and the reserve to the lands sought. The reasons put forth by FERC, which have since been supported by the BLM surface protection specialist, when added to the District Office's reasons for recommending a no-surface occupancy stipulation, justify a refusal to lease the lands in the public interest. It is not a matter of FERC's view overriding that of the Butte District Office.

We point out to appellant that the FPC's 1973 recommendation concerning other lease offers was not based solely on the fact that the land had been restored to entry. <sup>3/</sup> That letter also stated that "[t]he lands are not presently being used for hydroelectric development purposes under permit or license issued by this Commission." At present the area is under a preliminary development permit.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Montana State Office is affirmed.

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Will A. Irwin  
Administrative Judge

We concur:

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Gail M. Frazier  
Administrative Judge

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Douglas E. Henriques  
Administrative Judge

<sup>3/</sup> We suggest, as well, that BLM would not be properly carrying out its responsibilities were it to base a decision whether or not to lease certain lands on a 10-year old recommendation directed at other lease offers. See Joseph C. Manga, 71 IBLA 187 n.1 (1983).

